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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 218

LEO N. MUNRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 31–34) in denying the Government's motion to dismiss the complaint for lack of jurisdiction, is reported in 10 Fed. Supp. 412. The opinion of the Circuit Court of Appeals (R. 48–52) is reported in 89 F. (2d) 614.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 19, 1937 (R. 53). The petition for writ of certiorari was filed July 15, 1937. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a suit on a contract of war risk term insurance was "brought" in time under the provisions of Section 19 of the World War Veterans' Act, 1924, as amended, in the absence of compliance with any of the requirements of Sections 5 and 6 of the Tucker Act within the statutory period of limitations for bringing such suits.

2. Whether the United States has waived the defense that the instant suit was not filed in time.

STATUTES INVOLVED

The pertinent statutory provisions are printed in the Appendix, *infra,* pp. 14–16.

STATEMENT

This is an action by the petitioner, Leo N. Munro, in the District Court of the United States for the Western District of New York, upon a contract of war risk term insurance (R. 8–11). It is conceded in the petition for writ of certiorari (p. 2) that this action was barred by the limitations provision of Section 19 of the World War Veterans' Act, 1924, as amended, *infra,* p. 14 unless "brought" on or before July 1, 1933.

On March 16, 1933, petitioner filed a praecipe for the issuance of a summons in the office of the Clerk of the District Court. On the same day, a summons was issued, pursuant to the praecipe, a copy of the summons was served upon the United States Attorney at Buffalo, New York, and an-

other copy sent by registered mail to the Attorney General in Washington, D. C. (R. 1, 3, 5–8, 17). On July 26, 1933, a copy of the complaint (R. 8–11) was served for the first time on the United States Attorney (R. 1, 12, 17, 25),[1] in which petitioner sought to recover monthly benefits under a contract of war risk term insurance on account of total and permanent disability alleged to have existed at the time of his discharge from the military service on June 25, 1919 (R. 10). The complaint itself, however, was not filed in court until April 23, 1936, after the trial (R. 4). On February 15, 1934, the United States Attorney filed an answer to the merits on behalf of the Government (R. 3, 12), and, on or about November 16, 1934, moved to dismiss the complaint for want of jurisdiction, upon the ground that suit upon the claim was barred under Section 19 of the World War Veterans' Act, 1924, as amended (R. 13–15), the complaint or petition not having been filed in the District Court and served upon the United States Attorney until after July 1, 1933.

Petitioner's attorney thereupon filed an affidavit to the effect, in part, that the procedure followed by him in attempting to bring suit had been approved by an Assistant United States Attorney,

[1] The Circuit Court of Appeals states in its opinion that it does not appear that a copy of the complaint or petition was ever sent to the Attorney General, by registered mail, as required by Section 6 of the Tucker Act, *infra*, p. 15 (R. 50).

who had assured him that it would be sufficient to give the District Court jurisdiction (R. 16–20).

On April 11, 1935, the Government's motion to dismiss was denied by District Judge Rippey (R. 34–35), who delivered an opinion holding that, under the Conformity Act, *infra*, p. 16, the issuance by the Clerk of the summons and its service according to State practice constituted the bringing of suit within the meaning of Section 19 of the World War Veterans' Act, 1924, as amended; that, in any event, the question whether the suit was brought within the time limitation prescribed by Section 19 constituted an affirmative defense; that the provisions for bringing the Government into court contained in the Tucker Act [2] were procedural and not jurisdictional, and that in consequence the defense of limitations, together with any procedural defects upon which such defense might be based, were waived by the Government's general appearance and answer to the merits (R. 31–34).

The case was tried before District Judge Knight and a jury on April 9, 1936 (R. 4). The evidence included testimony by petitioner's attorney which was substantially to the same effect as his affidavit previously filed in opposition to the motion to dismiss for lack of jurisdiction (R. 21–30). At the

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[2] Under Section 19 of the World War Veterans' Act, *infra*, p. 14, Sections 5 and 6 of the Tucker Act, *infra*, pp. 15–16 are expressly made applicable to suits upon contracts of war risk insurance.

close of petitioner's case, the Government again moved to dismiss the action on the ground that suit had not been commenced in time, and the motion was denied (R. 30). The motion was renewed at the conclusion of the entire case and was again denied, exception being noted to this ruling (R. 31). A verdict was rendered for petitioner, and judgment was entered thereon July 29, 1936 (R. 4, 35). An appeal was taken September 3, 1936 (R. 38–39), assigning error separately to the several denials of the motions to dismiss (R. 40–41). All of the proceedings pertinent to these motions were incorporated in a timely bill of exceptions (R. 13–31, 42–45).

The Circuit Court of Appeals for the Second Circuit unanimously reversed the judgment of the District Court, for the reasons, as stated in its opinion (R. 48–52), that the provisions of Sections 5 and 6 of the Tucker Act, requiring that a petition "shall" be filed and a copy thereof be served upon the United States Attorney and mailed to the Attorney General,[3] are mandatory and exclusive of State practice under the Conformity Act in suits like the present one; that such a suit could not be deemed to have been brought at least until a copy of the petition had been served upon the United States Attorney; that the suit was barred because neither this nor any of the other requirements of

[3] The opinion omitted any reference to the fourth requirement that an affidavit of service be filed with the clerk.

the Tucker Act were complied with until after the expiration of the time limitation prescribed by Section 19 of the World War Veterans' Act, 1924, as amended; and that petitioner's failure to bring his suit in time was not waived by the assurance of the Assistant United States Attorney that service of summons would toll the statute of limitations, or by the filing of an answer to the merits, since the time limitation is a condition of the court's jurisdiction over the subject matter of the action, and cannot be waived. Decisions relating to waiver of matters of venue were held to be not in point.

ARGUMENT

I

The decision of the Circuit Court of Appeals to the effect that at least the requirement of service of a copy of the petition on the United States Attorney must be complied with in order to stop the running of the limitation period contained in Section 19 of the World War Veterans' Act of 1924, as amended, finds ample support in the decisions which announce the rule that, when the United States consents to be sued, the conditions of such consent must be strictly complied with (*Schillinger* v. *United States,* 155 U. S. 163, 166; *United States* v. *Michel,* 282 U. S. 656, 659; *Tyson* v. *United States,* 76 F. (2d) 533, 535 (C. C. A. 4th), affirmed, 297 U. S. 121); that this rule applies to the pro-

cedure to be followed (*Reid* v. *United States,* 211 U. S. 529, 538; *Rock Island &c. R. R. Co.* v. *United States,* 254 U. S. 141, 143; *Reid Wrecking Co.* v. *United States,* 202 Fed. 314 (N. D. Ohio); *Walton* v. *United States,* 73 F. (2d) 15, 17 (C. C. A. 8th)); and that where, as here, Congress has legislated with respect to the subject, the Conformity Act, *infra,* has no application (*Southern Pacific Company* v. *Denton,* 146 U. S. 202, 209).

Moreover, the decision of the Circuit Court of Appeals would seem to be supported by the plain language of Sections 5 and 6 of the Tucker Act, expressly made applicable to suits on contracts of war risk insurance by Section 19 of the World War Veterans' Act, 1924, as amended. Construing these provisions together, they specifically provide that in any suit upon a contract of war risk insurance the plaintiff "shall" file a petition, serve a copy thereof upon the United States Attorney, and mail a copy to the Attorney General.

The historical background of the provisions also gives support to the conclusion that they can have significance only under the construction that the conditions set forth therein were meant to be conditions precedent to the commencement of the action. Under the common law both in England and in this country, actions were commenced by the issuance of a writ with a bona fide intention to

make service thereof (Angell on Limitations, 6th Edition, Sections 311, 312, 318). It was always essential, however, that ultimately a complaint or declaration be filed, and a copy thereof served upon the defendant. While, in many States, this procedure had been altered by statute at the time of the passage of the Tucker Act (1887) (Wood on Limitations, 1st Edition, 1883, and 2nd Edition, 1893, Sec. 290), no jurisdiction had dispensed with the requirements that, at some stage during the proceeding, a petition be filed and served. It follows that, had adoption of local practice under provisions of the Conformity Act, *infra*, p. 16, been contemplated for suits brought under the Tucker Act, the provisions of the latter requiring the filing and service of a petition would have been wholly superfluous.

A Congressional intent to require the filing and service of a petition as essential for commencement of suit was amply supported by precedent. An identical change in equity procedure had been made in England in 1705 (4 Anne, c. 16, Sec. 22) and carried forward in this country (*United States* v. *American Lumber Co.*, 80 Fed. 309, as affirmed, 85 Fed. 827 (C. C. A. 9th)). Moreover, when the Tucker Act was passed, several of our own States had extended to all civil actions the requirement that a complaint be filed prior to issu-

ance of the summons. (Wood on Limitations, 1st and 2nd Editions, Sec. 290, *supra.*)

Furthermore, as to suits against the United States, the desirability of a uniform procedure and a procedure requiring initial disclosure of the nature of the action, is readily apparent. Different from a private litigant, usually subject to suit only in his own locality and on causes of action probably known to him in advance, the Government, by the Tucker Act, made itself subject to suit in any district on causes of action which, in all probability, were not known in advance to either the United States Attorney or the Attorney General. As proper defense of a suit must be predicated upon early knowledge of the nature thereof, a Congressional intent to permit commencement of a suit only by filing and serving a petition is clearly consistent with the practical situation created. Also, the view that the Tucker Act is exclusive, providing for one uniform method of commencing suits against the Government, may be deemed consistent with an intention to avoid uncertainty and confusion inherent in the adoption of the local practice of each of the several States. At the time of the passage of the Tucker Act (Wood on Limitations, 1st and 2nd Editions, Sec. 290, *supra*), as at the present time, State practice varied from the provision that suit is commenced

merely upon issuance of the writ to the requirement that a complaint be filed and served.

As is pointed out by the Circuit Court of Appeals in its opinion (R. 51), its decision is supported either directly or by clear inference by two decisions of other Circuit Courts of Appeals and by eight District Court decisions. While three District Court decisions were cited by the Circuit Court of Appeals as supporting a contrary conclusion (*Miller* v. *United States,* 13 F. Supp. 684 (W. D. N. Y.); *Bennett Day Importing Co.* v. *United States,* 8 F. (2d) 83 (S. D. N. Y.); *Mill Creek & M. N. & R. Co.* v. *United States,* 246 Fed. 1013 (E. D. Pa.), affirmed per curiam, 251 U. S. 539), they, of course afford no basis for the issuance of a writ of certiorari. It may be pointed out that two of these decisions were rendered by District Courts in the Second Circuit (*Bennett Day Importing Co.* and *Miller cases*), and were therefore overruled by the decision of the Circuit Court of Appeals for that Circuit in the present case. Moreover, one of these two decisions (*Miller case*) was rendered by the same District Judge who denied the Government's first motion to dismiss in the present case.

Indeed, the only case cited by the petitioner as establishing a conflict of decisions is the per curiam affirmance by this Court (251 U. S. 539) of the District Court decision in the *Mill Creek case, supra.* That per curiam affirmance has never been deemed by any court to constitute a decision of the

question here presented. Although the ten decisions cited by the Circuit Court of Appeals in the instant case in support of its opinion were all decided subsequent to the per curiam affirmance in the *Mill Creek case,* none of them made reference to that case. And although the District Court opinion in the *Mill Creek case* was cited in support of the decision in the *Bennett Day case,* the court did not rely upon the per curiam affirmance by this Court. In the instant case the per curiam affirmance in the *Mill Creek case* was considered by the Circuit Court of Appeals and deemed distinguishable (R. 51–52).

II

The Circuit Court of Appeals was clearly correct in holding that the petitioner's delay in bringing suit was not waived by the statement of an Assistant United States Attorney that service of a summons would toll the statute, or by the filing of an answer of general denial after the copy of the petition had been served upon the United States Attorney. This follows under the rule now well established that the court's jurisdiction over the subject matter in suits upon contracts of war risk insurance is contingent upon the timely commencement of suit (*Lynch* v. *United States,* 80 F. (2d) 418, 419 (C. C. A. 5th), certiorari denied, 298 U. S. 658, rehearing denied, 298 U. S. 692; *United States* v. *Trollinger,* 81 F. (2d) 167, 168–169 (C. C. A. 4th); *United States* v. *Valndza,* 81 F. (2d) 615 (C. C. A. 6th)). In line with the decisions in cases

involving war risk insurance, similar provisions in the Tucker Act for limitation upon suits in the Court of Claims (*Finn* v. *United States,* 123 U. S. 227; *DeArnaud* v. *United States,* 151 U. S. 483, 495–496; *United States* v. *Wardwell,* 172 U. S. 48, 52), and in the District Courts (*Compagnie Generale Transatlantique* v. *United States,* 51 F. (2d) 1053, 1056 (C. C. A. 2d); *Carpenter* v. *United States,* 56 F. (2d) 828 (C. C. A. 2d)), have been held to involve jurisdiction over the subject matter. See also *Louisville Cement Co.* v. *Interstate Commerce Commission,* 246 U. S. 638, 642, and *Atlantic Coast Line R. R.* v. *Burnette,* 239 U. S. 199, 201, where similar rulings were made as to like provisions in the Interstate Commerce Act and the Employers' Liability Act, respectively.

That limitation provisions of this nature, because they involve jurisdiction over the subject matter, cannot be waived is apparent from the decision of this Court in *Tucker* v. *Alexander,* 275 U. S. 228, 232, where it was said, in connection with a similar statutory limitation, that waivers thereof by Government officers, if allowed, "would defeat the only purpose of the statute and impose a liability upon the United States which otherwise would not exist." See also *Atlantic Coast Line R. R.* v. *Burnette, supra.*

CONCLUSION

The opinion of the court below is clearly sound and there exists no such conflict of decisions as

requires review by this Court. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1937.

APPENDIX

STATUTES INVOLVED

Section 19 of the World War Veterans' Act, 1924, as amended, as contained in Section 445, Title 38, U. S. C., provides:

> *In the event of disagreement as to claim,* including claim for refund of premiums, *under a contract of insurance* between the Veterans' Administration and any person or persons claiming thereunder *an action on the claim may be brought against the United States* either in the Supreme Court of the District of Columbia or *in the district court of the United States* in and for the district in which such persons or any one of them resides, and jurisdiction is hereby conferred upon such courts to hear and determine all such controversies. *The procedure in such suits shall be the same as that provided in sections 762 and 763 of Title 28,* and section 765 of Title 28 so far as applicable.[1] * * *
>
> *No suit* on yearly renewable term insurance *shall be allowed under this section unless the same shall have been brought within six years after the right accrued* for which the claim is made *or within one year after July 3, 1930, whichever is the later date,* * * * : *Provided,* That for the purposes of this section it shall be deemed that the right accrued on the happening of the con-

[1] Section 765 relates to procedure in the event of a judgment adverse to the Government, and is not pertinent here.

tingency on which the claim is founded: *Provided further,* That *this limitation is suspended for the period elapsing between the filing in the Veterans' Administration of the claim* sued upon *and the denial of said claim* by the Administrator of Veterans' Affairs. * * * [Italics ours.]

Section 5 of the Act of March 3, 1887, commonly known as the Tucker Act, as contained in Section 762, Title 28, U. S. C., provides:

> *The plaintiff* in any suit brought under the provisions of section 41, paragraph 20, of this title *shall file a petition,* duly verified with the clerk of the respective court having jurisdiction of the case, and in the district where the plaintiff resides. Such petition shall set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claim is based, the money or any other things claimed, or the damages sought to be recovered and praying the court for a judgment or decree upon the facts and law. [Italics ours.]

Section 6 of the Tucker Act, as contained in Section 763, Title 28, U. S. C., provides:

> *The plaintiff shall cause a copy of his petition* filed under section 762 of this title, *to be served upon the district attorney* of the United States in the district wherein suit is brought, *and shall mail a copy* of the same *by registered letter, to the Attorney General* of the United States, *and shall* thereupon *cause to be filed* with the clerk of the court wherein suit is instituted *an affidavit of such service and the mailing of such letter. It shall be the duty of the district attorney*

upon whom service of petition is made as aforesaid to appear and defend the interests of the Government in the suit, and *within sixty days after the service of petition upon him,* unless the time should be extended by order of the court made in the case *to file a plea, answer, or demurrer on the part of the Government,* and to file a notice of any counterclaim, set-off, claim for damages, or other demand or defense whatsoever of the Government in the premises. Should the district attorney neglect or refuse to file the plea, answer, demurrer, or defense, as required, the plaintiff may proceed with the case under such rules as the court may adopt in the premises; but the plaintiff shall not have judgment or decree for his claim, or any part thereof, unless he shall establish the same by proof satisfactory to the court. [Italics ours.]

R. S. Sec. 914, commonly known as the Conformity Act, as contained in Section 724, Title 28, U. S. C., provides:

> *Conformity to practice in State courts.* The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such district courts are held, any rule of court to the contrary notwithstanding.

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